

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RICHMOND DISTRICT NEIGHBORHOOD CENTER

and

Case 20-CA-091748

IAN CALLAGHAN

GENERAL COUNSEL’S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE’S DECISION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel files the following exceptions to the Decision of Administrative Law Judge Jay R. Pollack, that issued on November 5, 2013.

<u>Exception Number</u>	<u>Page</u>	<u>Line</u>	<u>Exception</u>
1	2	28 - 30	Failure to find that Callaghan and Moore: had no history of previous disciplines; received positive evaluations from their supervisor for their work performance; had never engaged in previous insubordinate acts; and were selected by Respondent for re-hire over other employees.
2	2	40 – 42	Failure to find that in response to the protected concerted May meeting, Respondent was annoyed, not receptive and upset with the employees; Respondent took their complaints as a personal attack; and referred to the employees as line workers.
3	2	40 - 42	Failure to find that Respondent refused to address any employee concerns after the protected concerted May meeting.

4	4	35 – 36	Failure to find that Cusano requested to terminate Callaghan and Moore within 6 minutes of reading their Facebook conversation.
5	4	36 - 37	Failure to find that Kaussen made the decision to terminate Callaghan and Moore prior to the August 6 meeting.
6	4	36 - 37	Failure to find that Respondent did not have a copy of their MOU and student/parent handbook in their meeting on August 6.
7	4	36 - 37	Failure to find that Respondent did not investigate Callaghan's and Moore's Facebook comments, did not consult Supervisor Payan, did not ask what their Facebook settings were, and never asked the employees to delete their Facebook conversation.
8	4	37 - 40	Failure to find that Respondent did not express its concerns about endangering its funding in Callaghan's and Moore's termination letters.
9	4	40	Failure to find that Callaghan submitted a post-termination letter to Respondent which explained his Facebook comments in context.
10	4	40	Failure to find that Respondent refused to address Callaghan's post-termination letter.
11	5	31 - 35	Failure to find that the Facebook comments referenced after school projects that Callaghan had previously proposed to Respondent but were rejected.
12	5	31 - 35	Failure to find that the Facebook conversation referenced the office staff's mistreatment of the Teen Center staff by not inviting them to parties and dismissing their ideas.
13	5	32 - 35	Failure to find that Callaghan's Facebook comment used intemperate language to refer to Respondent's indifference towards the youth.
14	5	32 - 35	Failure to find that Callaghan and Moore discussed in their Facebook conversation the intent to continue their protected concerted activity the following school year.
15	5	35 - 41	Failure to find that Callaghan and Moore used intemperate language in reaction to Moore's demotion.

16	6	11 – 22	Failure to consider that Cusano’s immediate decision to terminate Callaghan and Moore was relevant background to properly analyze Respondent’s defense.
17	6	12 - 29	Failure to consider in context that the Facebook comments referenced after school projects that Callaghan had previously proposed to Respondent.
18	6	12 - 29	Failure to consider that the context of the Facebook comments was that Callaghan and Moore felt the office staff mistreated the Teen Center staff by not inviting them to parties and dismissing their ideas.
19	6	12 – 29	Failure to consider in context Callaghan’s and Moore’s previous work performance, lack of previous disciplines, previous work evaluations and that Respondent selected them for re-hire over other employees.
20	6	12 – 29	Failure to consider the timing of the Facebook conversation after Moore’s demotion.
21	6	12 – 29	Failure to consider that the Facebook conversation was set to private in the analysis of whether it lost the protection of the Act.
22	6	12 – 29	Failure to consider that Callaghan and Moore discussed in their Facebook conversation the intent to continue their protected concerted activity the following school year.
23	6	12 – 29	Failure to analyze the content, timing and context of the Facebook conversation based on the “totality of the circumstances” objective standard test established in <i>Fresenius USA Manufacturing</i> , 358 NLRB No. 138 (2012).
24	6	17 - 18	Failure to find that Callaghan could not physically take the youth on field trips without permission.
25	6	20 - 21	Failure to find that Respondent’s concerns over funding and safety to its youth were speculative.
26	6	22 - 29	Failure to find that no parent, school board member or donor ever saw or complained about Callaghan’s and Moore’s Facebook comments.
27	6	23 - 24	Failure to apply the objective standard established in <i>Fresenius</i> to evaluate Respondent’s defense.

28	6	27 - 29	Finding that Respondent could lawfully conclude that the actions proposed in the Facebook conversation were not protected under the Act and that the employees were unfit for further service.
29	6	27 - 29	Failure to find Respondent violated Section 8(a)(1) of the Act by terminating Callaghan and Moore.
30	6	30 - 42	Failure to order Respondent to cease and desist from violating the Act, reinstate and make whole Ian Callaghan and Kenya Moore including reimbursing them for excess taxes owed and reporting backpay to the Social Security Administration, and issue a Remedial Notice to all of its employees.

DATED at San Francisco, California, this 14th day of January, 2014.



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I. INTRODUCTION

The Administrative Law Judge (ALJ) erred in finding that Richmond District Neighborhood Center (Respondent) did not violate Section 8(a)(1) of the Act when it discharged Ian Callaghan and Kenya Moore because their Facebook conversation lost the protection of the Act. The ALJ correctly found that Callaghan and Moore engaged in protected concerted activities in their Facebook discussion; however, he failed to consider material facts directly relevant to the legal inquiry of whether Respondent's purported interpretation of the Facebook statements was a reasonable one. These facts would have compelled the ALJ to place the Facebook conversation in its proper context. By placing the Facebook comments in their proper context, as Board precedent requires, the ALJ could not have simply adopted Respondent's interpretation of the Facebook conversation at face value. Instead, he would have had to evaluate the reasonableness of Respondent's claimed belief that Callaghan and Moore were conspiring to commit actual misconduct, rather than commiserating with each other using intemperate and impulsive language, the kind of knee-jerk language that is often used in social media between "friends" who share workplace grievances. The ALJ ignored substantial material evidence such as: Callaghan's and Moore's previous laudatory job performance record (especially in their dealings with the students in their care); that the comments were a continuation of their workplace grievances, especially those comments referencing past after-school programs that Callaghan had hoped Respondent would authorize but did not; and that Respondent's inaction, or actions, both after the protected concerted May staff meeting and after seeing the Facebook conversation, were contrary to its putative concern about funding or student safety. Given this evidence, the only reasonable conclusion the Judge could have reached was

that Callaghan and Moore had no intention of jeopardizing Respondent's funding or safety when they used impulsive, but rhetorical language to say they intended to continue their workplace grievances. Thus, Respondent unlawfully terminated Callaghan and Moore for engaging in this protected concerted activity on Facebook.

This brief will detail the undisputed material facts that provide the context to the Facebook conversation, and after doing so, it will show that the ALJ erred by not considering those facts. Had the ALJ properly analyzed the Facebook conversation within its context, in accordance with the "totality of circumstances" test articulated in *Fresenius USA Manufacturing, Inc.*, 358 NLRB No. 138, slip op. at 9 (2012), no reasonable person, and certainly not Respondent nor the ALJ, could have reasonably believed that Callaghan and Moore's Facebook conversation was a plan of future conduct that would have jeopardized funding or student safety.

II. THE ALJ CORRECTLY FOUND THAT CALLAGHAN AND MOORE ENGAGED IN PROTECTED CONCERTED ACTIVITIES

Ian Callaghan, the Charging Party, and Kenya Moore worked for Respondent at an-after school program for high school students called the Beacon Teen Center located at George Washington high school in the Richmond District of San Francisco. (ALJD 2: 18-21, 28). Callaghan, an Activity Leader, worked closely with Moore, the Teen Center Program Leader, during the 2011-2012 school year. In May 2012, they complained about their working conditions in concert with other co-workers. The school year ended without any of those complaints being addressed by Respondent. (Tr. 31, 82-83, 106-107). In July 2012, Respondent renewed Callaghan's and Moore's employment at the Beacon Teen Center for the upcoming school year. (ALJD 2: 28-30). However, before the new school year began, and after learning that Moore had been demoted to the position of Teen Activity Leader, Callaghan and Moore engaged in a Facebook conversation about the complaints they had back in May as well as about

Moore's recent demotion. (ALJD 2: 21, 28-30, J. Exh. 6). Respondent saw their Facebook conversation and discharged them because of that conversation.

A. The ALJ Correctly Found That The Teen Center Staff Engaged In Protected Concerted Activities In May, But Failed to Make Important Findings Of Fact (Exception Numbers 2 - 3)

In his decision, the ALJ correctly found that the employees first engaged in protected and concerted activity in May when they listed their concerns with Respondent's program and presented them to supervision. (ALJD 5: 26-29). The ALJ also found that Callaghan attempted to set up a follow-up meeting with management but was rebuffed. (ALJD 2: 40-41). He also noted that Callaghan testified that after the May meeting, the office staff turned a cold shoulder to the Teen Center employees. (ALJD 2: 41-42). However the ALJ failed to make important findings of fact which showed management's animosity towards the employees' protected concerted May meeting. For example, undisputed facts establish that each time Callaghan requested a follow up meeting, Supervisor Payan told him that the office staff "had taken what we had written down on the butcher paper as offensive, an attack like we were attacking their job performances." (Tr. 31). Payan also stated that "the office doesn't have meetings with line workers, and was referring to the Teen Center staff." (Tr. 32). Neutral, current employee Cole Manieri confirmed that Multicultural Program Coordinator Alexandria Tom also told him the week after the May meeting that the office staff was upset and Payan had cried because of their complaints. (Tr. 106). Manieri testified that Tom said that Director of Satellite Services "Shawn Brown was more annoyed with us for complaining about working conditions. And he referred to us as, 'line workers.'" (Id.). Callaghan testified that Tom repeated this comment to him after he was fired and told him that with regards to the May meeting "everyone in the office had been upset, and taken it as a personal attack on their job performances." (Tr. 33-34). Had Tom been

allowed to testify, she would have also confirmed that Beacon Director Cusano was not receptive to the employee complaints and indeed was upset by them. (Tr. 202).¹

Furthermore, the ALJ failed to find that Respondent refused to address any employee concerns after the protected concerted May meeting. Callaghan, current employee Sarah Godfrey and Manieri all testified that there was never any follow-up to the May meeting. (Tr. 31, 82-83, 106-107). Godfrey and Manieri noted that Payan did not attempt to have another evaluation-type meeting the following school year (Tr. 83, 107); and Beacon Director Michelle Cusano admitted that an evaluation-type meeting of this sort did not occur again the following school year. (Tr. 179-180).

By not making these findings of fact the ALJ failed to fully consider the events leading up to the Facebook conversation. As a result the ALJ did not properly analyze the context in which the Facebook conversation occurred, and whether Respondent could have reasonably interpreted the Facebook comments as planning future misconduct, or whether Respondent fired the employees for engaging in protected activities.²

B. The ALJ Correctly Found That Callaghan and Moore Continued Their Concerted Activities Regarding Working Conditions During Their Facebook Conversation, But Failed To Make Important Factual Findings

The ALJ correctly found that Callaghan and Moore continued to engage in protected concerted activity by engaging in the Facebook conversation in which they: voiced their

¹ The ALJ failed to continue the hearing to a later time when Tom would be available to provide testimony in person. The General Counsel does not take exception to this ruling because Respondent admitted that Tom was a 2(11) supervisor and these facts have been established by Callaghan's and Manieri's testimony regarding Tom's admissions to them.

² While not a motive case, General Counsel notes that by firing Callaghan and Moore, Respondent was preventing them from engaging in any further protected discussion by refusing follow-up meetings and terminating the troublemakers who had dared to air their continuing grievances on Facebook.

disagreement with management's running of the Teen Center; they discussed Moore's demotion; they specifically continued to discuss the complaints that Respondent's office staff viewed the Teen Center employees as "line workers"; continued to discuss the office staff's lack of appreciation for the Teen Center staff and continued to discuss Respondent's failure to respond to employees' concerns. (ALJD 5: 32-38). The ALJ, however, failed to make additional factual findings supported by undisputed record evidence. These findings of fact are important because once again they provide the context of the Facebook conversation, and the context directly relates to General Counsel's main exception, that the ALJ failed to address whether or not Respondent could reasonably have interpreted their Facebook conversation as planning future unprotected conduct.

1. The ALJ Ignored Undisputed Facts Showing The Context Of The Facebook Conversation (Exception Numbers 11 – 13 and 24)

The ALJ should have made the following findings of fact regarding the Facebook conversation being a continuation of the protected concerted May complaints. Callaghan expounded on the theme of Respondent's neglect of its employees when he referenced a project in his 7:29PM comment about getting artists to come in and teach the kids how to do graffiti-style art on butcher paper put up on the walls of the Beacon; a project that he had previously suggested and that management had ignored. (J. Exh. 7, p. 2, Tr. 38-39). Employees Godfrey and Manieri corroborated that Callaghan proposed the idea of having a graffiti-style art project for the youth. (Tr. 86, 108). Another undisputed fact the ALJ should have found is that when Callaghan commented at 7:29PM "I don't feel like being their bitch and making it all happy-friendly middle school campy," he was referencing their view of Respondent's indifference to the youth and that Respondent would talk to the youth as if everything was good and happy, when what they were actually doing was ignoring the youth's serious issues, and refusing to have

real discussions with them. (J. Exh. 7, p. 2, Tr. 39). Callaghan also referenced the office staff's mistreatment of the Teen Center staff, when he talked about having parties without the office staff in his 7:40PM comment. (J. Exh. 7, p. 3). Callaghan stated that he made this comment sarcastically and the ALJ should have found since the evidence was undisputed, that the office staff would often have parties without inviting the Teen Center staff, and when the Teen Center staff would invite the office staff to an event, the office staff never joined them. (Tr. 42).

Another finding of fact the ALJ should have made is that Callaghan referenced Respondent's lack of appreciation of its employees when Callaghan mentioned doing things "on my own" in his 7:40PM comment. (J. Exh. 7, p. 3). Callaghan stated that this meant that he would rather work more with the Teen Center staff before requesting permission from the office staff, because if their ideas were not concrete, then it was easier for the office staff to dismiss a lot of their ideas. (Tr. 42). When Callaghan used profanity in his 7:48PM comment, he stated that this was to show that he was in solidarity with Moore, that despite Respondent making them feel unappreciated, he wanted to let her know that he would work with her in the coming year. (J. Exh. 7, p. 4, Tr. 43, 56). Further, Callaghan's comment about taking the kids on field trips to wherever they want also made at 7:48PM, referred to his frustration of previously attempting to create a field trip, but not getting the resources or information from management to do so. (J. Exh. 7, p. 4, Tr. 43, 57). Callaghan explained that "you wouldn't not ask for permission" because he knows that it was part of his job to work with the office staff. (Tr. 37). Additionally, it was not physically possible to take the youth on field trips without permission because Callaghan does not have a vehicle or the money to do so, and there is security on the premises. (Tr. 44). This was corroborated by current employees Godfrey and Manieri. (Tr. 88, 109). Again, these findings of facts place the Facebook conversation in its proper context and establish

that neither Callaghan nor Moore intended to engage in conduct that would jeopardize Respondent's funding or the safety of the youth they serve. Instead, at least two of the comments referenced two projects that Callaghan has previously suggested and Respondent had ignored. Thus, given this context, Respondent could not have reasonably concluded that Callaghan and Moore were planning on engaging in future misconduct.

2. The ALJ Ignored Respondent's Immediate Response Towards The Facebook Conversation Discussing An Intent To Continue The Protected Concerted Activity When The New School Year Began (Exception Numbers 14 - 15)

Although the ALJ correctly found that Callaghan and Moore's Facebook conversation discussed Moore's demotion, he failed to consider that as one of the reasons why Callaghan and Moore used such intemperate and profane language to convey solidarity with each other. (ALJD 5: 35-41). The ALJ also failed to consider that one of Callaghan's Facebook comments directly referenced his intent to continue raising employees' workplace concerns the following school year. At 7:56PM in their Facebook post, Callaghan commented that he would "be back to raise hell wit ya," meaning he would be back to work with Moore and to work through the issues that they had brought up during their May meeting. J. Exh. 7, p. 4, Tr. 44. This comment showed Callaghan's intention to continue the employees' protected concerted complaints the following school year. An opportunity he was deprived of when Respondent fired him before the new school year began. *Parexel International, LLC*, 356 NLRB No. 82, slip op. at 2 (2011) (Board found that an employee is protected under the Act when an employer conducts "a pre-emptive strike to prevent [an employee] from engaging in activity protected by the Act" by terminating that employee prior to a concerted discussion.) This factual finding is significant because it offers important context for the evaluation of Respondent's defense, which the ALJ failed to consider.

3. The ALJ Failed To Find That Respondent Ignored Callaghan's Explanation Of His Facebook Conversation (Exception Numbers 9 – 10)

The ALJ failed to make the factual finding that Callaghan sent Respondent an e-mail explaining his protected concerted Facebook conversation and Respondent nevertheless refused to address it. On August 20, Callaghan sent an e-mail to Respondent with his view that he was fired not for the purported reasons set forth in Respondent's termination letter but because he had dared to engage in protected concerted activities on Facebook for the purpose of mutual aid and support. GC Exh. 6. A significant part of this e-mail reads,

It was very evident that we were nothing more than 'line workers' told to go work 'the floor.' The same as employees at McDonald's, or factory jobs, or any other underappreciated work. So when asked, during an evaluation, what we thought of the Beacon, we said we felt like you treated us like children, we were frustrated, and felt a general lack of support. We requested nothing more than a meeting with the salary staff, and were completely ignored. I'm sure it was treated the same as any factory work where the line workers organize, and instead of results, the efforts at communication are received as offensive. I have no doubt everyone was upset and said, "How dare they?" We, however, were left with no response, and no change...I should be able to vent and/or console with a coworker outside of the grounds of the workplace, off-the-clock, in a private conversation that was then actively sought out by this organization...and technically not even employed, without having words taken out of context, and then not only being held accountable for them in the workplace, but made to feel small for having said them. This is a freedom I should be able to enjoy without fear of repercussion or ostracism, and Section 7 of the National Labor Relations Act agrees, stating, "Employees shall have the right to...engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection..." which extends to Facebook comments. (Id).

Callaghan sent this e-mail because he felt that the Facebook conversation that Respondent had fired him for had been taken out of context, and because it was an "attempt to create some sort of conversation with the office staff and the Teen Center staff." Tr. 47. Respondent never responded to Callaghan's e-mail. Tr. 48. The ALJ's failure to find these undisputed facts is material because Callaghan's explanation goes to the heart of General Counsel's main exception: whether Respondent could reasonably have interpreted the Facebook

comments as a plan of future misconduct, or as Callaghan states, whether Respondent purposefully misconstrued the Facebook conversation by taking it out of context in order to terminate the two employees who continued to discuss their protected concerted complaints online.

III. THE ALJ ERRED IN FINDING THAT THE FACEBOOK CONVERSATION LOST THE PROTECTION OF THE ACT (Exception Number 22)

A. The ALJ Acknowledged The Correct Legal Test, But Failed To Apply The Objective Standard From That Test (Exception Numbers 23 and 27)

The ALJ correctly noted that “when an employee is discharged for conduct that is part of the *res gestae* of protected activities, the question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service.” (ALJD 5:43-47). The ALJ also acknowledged that employees are permitted some leeway for impulsive behavior when engaged in concerted activity and that protection is not denied to an employee regardless of the lack of merit or the inaccuracy of the employee’s statements...even where the employee’s language is stinging and harsh. (ALJD 6: 1-9). However, the ALJ significantly erred by failing to apply the correct legal standard concerning the central issue in the case: whether the employees’ Facebook conversation lost the protection of the Act. (ALJD 5-6: 43-48, 1-29).

The law is clear that whether employees have lost the protection of the Act does not depend on the employer’s “subjective perception” of their behavior or what Respondent could have concluded. *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), *enfd.* 652 F.3d 55 (D.C. Cir. 2011). “Rather, the question is an objective one; i.e. whether the alleged misconduct is so serious that it deprives the employees of the protection of the Act normally given for engaging in concerted activity.” *Id.* (quoting *Shell Oil Co.*, 226 NLRB 1193, 1196 (1976), *enfd.*,

561 F.2d 1196 (5th Cir. 1977). In *Fresenius USA Mfg.*, *supra* slip op. at 9, the Board noted that in determining whether employees' statements have lost the protection of the Act, it "has on occasion assessed statements made by one employee to another by looking at the **totality of circumstances**, without specific reference to the *Atlantic Steel* factors." (emphasis added). In subsequent cases, the Board held "where the Respondent contends that the Facebook postings were unprotected from the outset, an *Atlantic Steel* analysis is unnecessary." *Hispanics United*, 359 NLRB No. 37, Fn 12 (2012); See *New York Party Shuttle*, 359 NLRB No. 112, Fn 7 (2013). This case warrants such a totality of the circumstances analysis because there is no dispute that the employees were fired because of their Facebook conversation and no other reason.

The ALJ failed to conduct even a modicum of analysis regarding the context of the Facebook conversation at issue in this case and completely failed to evaluate, under the totality of the facts, whether Respondent's reading of the Facebook conversation was objectively reasonable. Instead, the ALJ listed Respondent's concerns regarding the Facebook comments and took them at face value, without evaluating the substantial evidence in the record that rebutted the reasonableness of Respondent's articulated concerns over funding and safety. The ALJ concluded that Respondent "*could* lawfully conclude that the actions proposed in the Facebook conversation were not protected and that the employees were unfit for service." (ALJD 6: 24-29, emphasis added). In so concluding the ALJ disregarded the applicable legal standard: that such a defense be evaluated based on *objective* reasonableness and not based on the employer's *subjective* perception about the Facebook conversation.

B. The Judge Failed To Consider The Context Of The Facebook Conversation
(Exception Numbers 1, 17 - 23)

Although certain portions of the Facebook conversation included profanity and inflammatory language, because it was part of the *res gestae* of otherwise protected activity, it

must be evaluated in context. *Id.*, slip op. at 6. Significantly, there was no evidence in the record, other than Respondent's mere speculation, to support the ALJ's conclusion that Respondent lawfully could have concluded that this language constituted either a threat or described an actual plan of insubordination or misconduct. The Board recognized an ALJ's finding that an employee's "use of rhetorical hyperbole to emphasize disapproval of management does not remove [otherwise protected] writing from the Act's protections." *Phoenix Transit System*, 337 NLRB 510, 514 (2002), *enfd.* 63 F. Appx. 524 (D.C. Cir. 2003); see also *El San Juan Hotel*, 289 NLRB 1453, 1455 (1988)("[T]he Act protects statements that are false, misleading, or inaccurate, as well as rhetorical hyperbole that is likely to be recognized for what it is..."). Where concerted activity is involved, the "law gives license...to use intemperate, abusive, or insulting language without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point." *Phoenix Transit System*, *supra* at 514 (citing *Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974)). See e.g., *Great Lakes Steel*, 236 NLRB 1033, 1035-37 (1978) (Board agreed with ALJ that pamphlet which described the employer's safety policy as "murder to save profit" and stated "we have got to get out and start raising hell again" was protected), *enfd.* 625 F.2d 131 (6th Cir. 1980).

Similarly, even language that would be threatening if taken at face value may, in context, be figurative speech that remains protected. See *Kiewit Power Constructors Co.*, *supra* at 710. (concluding that employee's remark that his supervisor had "better bring [his] boxing gloves" was "more likely to have been a figure of speech, emphasizing employee's opposition to [the employer's] policy, rather than a literal invitation to engage in physical combat"); *Leasco, Inc.*, 289 NLRB 549, 549 n.1 (1988)(finding that employee's statement to a supervisor, "If you take

my truck, I'm kicking your ass right now," made in the course of engaging in concerted activity, was "a colloquialism that standing alone does not convey a threat of actual physical harm").

While advocacy of unprotected activity may itself be unprotected, "mere talk" about the subject does not necessarily lose the Act's protection. *Can-Tex Indus.*, 256 NLRB 863, 872 (1981), enfd. in relevant part, 683 F.2d 1183 (8th Cir. 1982) (Board agreed with ALJ's finding that employee's "mere talk" in support of shutdown would be protected activity, even if the shutdown itself were not protected). It is also settled that "an employee's use of vulgar or profane language does not necessarily cost the employee the protection of the Act, if it is part of the res gestae of otherwise protected activity." *Fresenius USA Mfg.*, *supra* slip op. at 6. "Such language must be evaluated in context." *Id.* For other profane language that was found to be protected see also *Alcoa, Inc.*, 352 NLRB 1222, 1225-1226 (2008) (referring to a supervisor as "egotistical fucker"); *Union Carbide Corporation*, 331 NLRB 356, 359-360 (2000), enfd. 25 F. Appx. 87 (4th Cir. 2001)(calling supervisor a "fucking liar"); *Burle Industries*, 300 NLRB 498, 501, 504 (1990) (calling supervisor a "fucking asshole"); *Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964), enfd. 351 F.2d 584 (7th Cir. 1965) (referring to supervisor as a "horse's ass").

Here, the content, timing and context of the comments demonstrate that they were an impulsive reaction to Moore's demotion and the employees' perception that Respondent was continuing to mistreat the Teen Center employees. The comments were not a threat or an actual plan of insubordination or misconduct. It is the Board's duty to "balance an employee's protected right...against the employer's right to maintain order and respect and also to permit some leeway for impulsive behavior." *Brunswick Food and Drug*, 284 NLRB 663, 664 (1987) (quotations omitted), enfd. mem., 859 F.2d 927 (11th Cir. 1988). The ALJ erred in finding that

Respondent's concerns that Callaghan's comments about playing loud music, getting artists to place graffiti on the walls, having parties all year and field trips all the time, and Moore's comments about not helping when they started losing kids and having fun because she would never be there and taking the kids when they could have clubs, could jeopardize Respondent's funding and threaten the safety of its youth. (ALJD 6: 12-29). In fact, the record established that in Callaghan's 7:29PM comment where he talked about graffiti, and in his 7:48PM comment where he talked about field trips, Callaghan was actually referencing his frustration with two projects that he had previously proposed and that management had ignored. (J. Exh. 7, p. 2, Tr. 38-39, 43, 57). Furthermore, the record established that Callaghan was referencing the office staff's mistreatment of the Teen Center staff when he talked about having parties without the office staff in his 7:40PM comment. J. Exh. 7, p. 3.

In terms of timing, the ALJ also failed to consider that the first part of the Facebook conversation took place within an approximate ½ hour period and was initiated after Moore first informed Callaghan that she had been demoted. (J. Exh. 7). It was reasonably foreseeable that both employees would be upset not only about her recent demotion, which was yet another example in their view of how Respondent mistreated of its employees, but also how it would affect their working conditions. Moore asked Callaghan if he is going back to work for Respondent ("U goin' back or no???"). He answered that he was going back but within the context of attempting to boost the morale of a co-worker that has just been demoted and trying to ensure that she comes back, which is why he was only going back if they are going to be there together "ordering shit, having crazy events at the Beacon all the time. I don't want to ask permission, I just want to be LIVE. You down?" Callaghan's rhetorical question about whether she agrees with this sentiment by asking, "You down?" was to encourage her to come back to

work. (J. Exh. 6, Tr. 37). This is contemporary urban figure of speech, spoken not just by the youth that Respondent serves but also by their employees who serve the youth. Callaghan did not say he *will* not ask for permission, he simply stated he does not want to, an expression of the frustration they were feeling regarding their workplace issues.

Furthermore, the ALJ also failed to consider the context of the rhetorical statements regarding “loosin’ kids” that followed the initial exchange, which was apparent from Callaghan’s and Moore’s work performance, and the “private” setting of their Facebook conversation which amplifies the fact that they did not intend to air their frustrations about their workplace grievances to the public, parents or funders. It is undisputed that Callaghan and Moore had no history of previous disciplines. (Tr. 142, 180). They had recently received positive evaluations from Supervisor Payan for their work performance. (J. Exh. 3 & 4). Indeed Callaghan’s performance evaluation stated that Callaghan modeled “the behavior and attitudes that he wants youth to have,” he ensured “an emotionally safe space,” and when Callaghan was confronted with policy or protocol that Callaghan did not agree with he would find “ways to align his belief with what is being asked of him.” (J. Exh. 3). Moore’s evaluation stated that Moore “takes direction very well,” students “feel comfortable going to her with any issue,” and she “keeps the Teen Center in a physically and emotionally safe state.” (J. Exh. 4). There was never any evidence that either employee had engaged in previous insubordinate acts. (Tr. 46, 89, 108-109). Furthermore, Respondent clearly believed that Callaghan and Moore were excellent employees, because they selected them over other employees for re-hire. (J. Exh. 5 & 6). Callaghan and Moore reaffirmed their commitment to Respondent’s program and the youth they served when they stated “we there for the kids” and “it’s all for the kids.” (J. Exh. 7, p. 5). Even current employee Godfrey understood that these last Facebook comments showed that Moore and

Callaghan were “dedicated to working with the young people at the Beacon.” (Tr. 98). Based on their positive evaluations, such as modeling appropriate behavior, creating a safe space for the students and taking direction well, and closing Facebook remarks reaffirming that it was all for the kids, it was unreasonable for Respondent to think that Moore and Callaghan were doing anything other than venting and consoling one another about workplace grievances in what they believed to be a “private” Facebook conversation.

Finally, had the ALJ also considered the comments that the employees would continue their protected concerted activities come the new school year, he could not have taken at face value Respondent’s purported concern over funding and safety. Rather, he would have had to analyze whether there was any objective basis for Respondent’s concern, given that the law is well-settled that the use of vulgar, profane, or intemperate language to make a point does not necessarily cost the employee the protection of the Act, if it is part of the *res gestae* of otherwise protected activity.

Similarly, had the ALJ evaluated the Facebook conversation in the context of the background facts -- the rejected after school projects that some of the comments referenced; the employees’ demonstrated past work performance and concern for the youth; the timing of the Facebook conversation that occurred on the heels of Moore’s demotion -- then he could not have concluded that Respondent lawfully fired Moore and Callaghan because their Facebook lost the protection of the Act. Rather, it would be clear to any reasonable person that their Facebook conversation was rhetorical hyperbole used to convey protected concepts of mutual aid, solidarity, and disapproval of management.

C. The Judge Failed To Consider Respondent's Immediate Response To The Facebook Comments And Lack Of Investigation Prior To The Termination Demonstrating How Speculative Its Concerns Were (Exception Numbers 4 – 8, 16 and 25 - 29)

Finally, the Judge also failed to find that there was no actual threat to Respondent's funding and that Respondent's own actions failed to show it was concerned about a threat to its funding.³ Instead, their immediate action shows Respondent clamping down on further protected concerted activity. The ALJ found that on August 3, Sarah Huck, Family Program Coordinator, sent screenshots of Callaghan's and Moore's Facebook conversation to her supervisor Brock Ogletree and Beacon Director Michelle Cusano. (ALJD: 4, 33-35). Cusano then sent an e-mail to Human Resources Manager Jan Nicholas requesting that Callaghan and Moore not be rehired. (ALJD: 4, 35-36). However, the ALJ failed to find that Cusano made this decision within 6 minutes of receiving Huck's e-mail. (J. Exh. 8). This meant that Cusano had no time to consult either the Memorandum of Understanding or student/parent guidebook on which Respondent allegedly based its decision to terminate, before recommending termination. Furthermore, the ALJ also found that Human Resources Director Jan Nicholas, Cusano and Executive Director Pat Kaussen decided to terminate the two employees on August 6. (ALJD 4: 36-37). However, the ALJ failed to find any facts concerning how Respondent made the decision to terminate Callaghan and Moore in this August 6 meeting. These uncontroverted facts are crucial in establishing whether Respondent could have reasonably concluded that the Facebook comments would jeopardize its funding.

First, Respondent's own records (namely Nicholas' notes) state that Kaussen wanted to fire the employees *prior* to meeting with Cusano and Nicholas on August 6. (J. Exh. 9, Tr. 145).

³ The Judge also failed to find that nowhere in their meticulously worded termination letters, did Respondent list a concern that the Facebook comments would jeopardize its funding. (J. Exh. 10 & 11).

Additionally, all three managers admitted that they did not have a copy of either their Memorandum Of Understanding (MOU) or the student/parent guidebook in their meeting and therefore could not cite specific sections of the MOU or guidebook that the Facebook conversation allegedly violated. Tr. 147-148. The ALJ erred in failing to consider these facts when evaluating, objectively whether Respondent terminated Callaghan and Moore lost the protection of the Act.

Furthermore, Human Resources Manager Nicholas did not undertake any investigation or action that would show she was concerned about funding. She did not consult or speak with the employees' direct supervisor Rena Payan; did not know how much interaction Program Director Cusano had with the employees; had never observed the Teen Center staff while they were working; never asked Huck, Callaghan or Moore what their Facebook privacy settings were; never asked the employees about their Facebook conversation; never asked the employees to delete their Facebook conversation; and never received any complaints about the Facebook conversation from either parents or members of the San Francisco Unified School District. (Tr. 142-143, 146-149). Cusano and Executive Director Kaussen confirmed that they also had not spoken with either of the employees about their conversation or their privacy settings prior to their termination. (Tr. 185, 199). Had Respondent truly considered the Facebook comments a danger to its funding, then it would have investigated whether the comments could be seen by the public, whether there had been any complaints made about the conversation, and it would have requested that the employees delete their conversation; however it never did so. (Tr. 149, 186). Respondent's immediate decision to terminate the employees upon seeing the Facebook comments and its lack of investigation regarding its purported concerns of funding and safety, establish that Respondent's purported concerns were entirely speculative and, if applying an

objective test, should not have been relied upon to find that Callaghan's and Moore's activity lost the protection of the Act.

In summary, the ALJ erred in relying on Respondent's entirely speculative subjective perception of the Facebook comments, instead of the objective undisputed findings of fact. Whether employees have lost the protection of the Act does not depend on the employer's "subjective perception" of their behavior or what Respondent could have concluded. *Kiewit Power Constructors Co.*, *supra* at 711, *enfd.* 652 F.3d 55 (D.C. Cir. 2011). "Rather, the question is an objective one; i.e. whether the alleged misconduct is so serious that it deprives the employees of the protection of the Act normally given for engaging in concerted activity." *Id.* (quoting *Shell Oil Co. supra*). In this case, the undisputed facts show that based on the content, timing and context of the Facebook conversation, the only reasonable interpretation of Callaghan and Moore's conversation was that they were using impulsive and intemperate language to convey protected concepts of mutual aid, solidarity, and disapproval of management. Therefore, the ALJ erred in not finding that Respondent violated Section 8(a)(1) of the Act when it terminated Callaghan and Moore.

IV. REMEDIES (Exception Number 30)

A. Reimbursement for Excess Taxes Owed

Under current tax laws, discriminatees who receive lump-sum backpay awards covering a multi-year backpay period are likely to incur federal and state income taxes at a higher rate than they would have had they received their wages in due course. The goal of the Act is to make whole the person who has suffered a loss of earnings and other compensation as a result of the discrimination. In order for discriminatees to be made whole, they should be reimbursed for amounts equal to the difference in taxes they owe upon receipt of a lump-sum

payment and the taxes they would have owed had they not been the subject of discrimination. Counsel for the Acting General Counsel seeks such a remedy in this case.⁴ Section 10(c) of the Act grants authority to the Board to devise remedies for various unfair labor practices, so long as such remedies “effectuate the policies of the Act.” See e.g. *Latino Express Inc.*, 359 NLRB No. 44 (2012); *Bettie Page Clothing*, 359 NLRB No. 96 (2013).

B. Reporting Backpay to the Social Security Administration

The Internal Revenue Service (IRS) and the Social Security Administration (SSA) consider backpay awards to be wages. See *I.R.S. Revenue Ruling 75-64*, 1975-1 C.B. 16 (1975) (backpay awards are wages for the purposes of the Federal Insurance Contribution Act, the Federal Unemployment Tax Act and the Collection of Income Tax at Source on Wages). For income tax purposes, the IRS treats all backpay as wages in the year paid. See *IRS Rev. Ruling 78-336*, 1978-2 C.B. 255 (1978). Likewise, SSA credits backpay awarded to an individual’s earnings record in the year reported by the employer. Accordingly, backpay is not credited to the proper year in which it would have been earned in the absence of a violation of the Act. This may result in lower social security benefits or a failure to meet the requirements for benefits. Upon notification of the employer or employee, SSA will allocate the backpay to the appropriate periods. See *IRS Publication 975 -- Reporting Back Pay and Special Wage Payment to the Social Security Administration*.

As stated above, the goal of the Act is to put the discriminatees back into the same situation they would have been in had it not been for the discrimination against them. Applying backpay paid for multiple years to a single year for Social Security purposes may have a

⁴ See *Webco Industries, Inc.*, 340 NLRB 10, 12 (2003) wherein the Board determined in a compliance proceeding that this issue must first be raised in the underlying unfair labor practice proceeding.

dramatic effect on a discriminatee's ability to secure benefits and/or may lower benefits. For this reason, employers should be required to complete the appropriate paperwork as set forth in *IRS Publication 975* to notify the SSA what periods to which the backpay should be allocated. Thus, Counsel for the Acting General Counsel seeks such a remedy in this case. See e.g. *Latino Express Inc.*, 359 NLRB No. 44 (2012); *Bettie Page Clothing*, 359 NLRB No. 96 (2013).

V. CONCLUSION

For the reasons set forth and discussed in detail above, the Board should conclude that the ALJ erred in failing to find that Respondent violated Section 8(a)(1) of the Act when it terminated Callaghan and Moore. Therefore, after finding merit to General Counsel's exceptions, the Board should additionally order an appropriate remedy requiring Respondent to: cease and desist from violating the Act, reinstate and make whole Ian Callaghan and Kenya Moore, and issue a Remedial Notice to all of its employees.

Dated at San Francisco, California, this 14th day of January, 2014.



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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20**

**RICHMOND DISTRICT NEIGHBORHOOD
CENTER**

and

IAN CALLAGHAN

Case 20-CA-091748

**AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND GENERAL COUNSEL'S BRIEF IN
SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

I, the undersigned employee of the National Labor Relations Board, state under oath that on January 14, 2014, I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

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